Supreme Court, U.S.
FILED

(1) 00 982 DEC 14 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

UDO BIRNBAUM,

Petitioner,

v.

RICHARD RAY; TOMMY W. WALLACE; JAMES B. ZIMMERMANN; RICHARD DAVIS; PAT MCDOWELL, JUDGE; LESLIE P. DIXON; BETTY DAVIS; WILLIAM JONES; BECKY K. MALONE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

UDO BIRNBAUM, PRO SE
540 VZ 2916
Eustace, TX 75124
(903) 479-3929

40 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1964(c) ("civil RICO") permits use of the "Rooker/Feldman" claim preclusion doctrine to keep plaintiff from showing his cause when the pleadings and evidence shows the initiation of the state court proceedings was itself an overt act in behalf of the alleged RICO enterprise.

2. Whether 18 U.S.C. § 1964(c) ("civil RICO") permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has plead all the elements of civil RICO and brought evidence of each defendant's conduct.

THE PARTIES

The Petitioner in this action is Udo Birnbaum, Pro Se.
The Respondents are all individual persons.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

THE PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

I. The Facts 2

II. The Proceedings Below 3

REASONS FOR GRANTING CERTIORARI TO QUESTION 1 6

I. The Appeals Court's decision that the *Rooker/Feldman* doctrine bars this Civil Rico cause conflicts with the legislative intent of RICO as expressed in this Court's *Rotella v. Wood* 6

II. Whether 18 U.S.C. § 1964(c) "civil RICO" permits the use of the *Rooker/Feldman* doctrine to keep a plaintiff from showing his cause is an important issue of federal Law that this Court should establish 10

REASONS FOR GRANTING CERTIORARI TO QUESTION 2 11

TABLE OF CONTENTS – Continued

Page

I. The Appeals Court's decision to affirm the granting of individual FRCP Rule 12(b)(6) motions to dismiss upon claims of immunity conflicts with this Court's opinion in *Crawford-El*..... 11

II. Whether 18 U.S.C. § 1964(c) "civil RICO" permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has plead all the elements of civil RICO and brought evidence of each defendant's conduct is an important Issue of Federal Law that this Court should establish... 13

CONCLUSION 16

APPENDIX

Appendix A
Court of Appeals Opinion .....App. 1

Appendix B
District Court Findings, Recommendations, and Conclusions of the Magistrate Judge .....App. 3

Appendix C
District Court Judgment .....App. 12

Appendix D
District Court Order denying de novo determination .....App. 15

Appendix E
Court of Appeals Order Denying Rehearing....App. 16

Appendix F
18 U.S.C. § 1964(c) "Civil RICO" and relevant sections of RICO .....App. 18

TABLE OF AUTHORITIES

Page

Federal Cases

Bass v. Parkwood Hosp., 180 F.3d 234 (5th Cir. 1999) 13

Bradley v. Pucket, 157 F.3d 1022 (5th Cir. 1998)..... 14

Brown v. Nationsbank, 188 F.3d 579 (5th Cir. 1999) 13

Campbell v. City of San Antonio, 43 F.3d 973 (5th Cir. 1995) 14

Crawford-El v. Britton, 523 U.S. 574 (1998) 11, 15, 16

Liedtke v. State Bar of Texas, 18 F.3d 315 (5th Cir. 1994).....8, 9

Reeves v. Sanderson Plumbing, U.S. Supr. Crt. No. 99-536 (June 12, 2000) 12, 16

Rotella v. Wood, U.S. Supr. Crt. No. 98-896 (Feb. 23, 2000).....6, 16

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).....5, 6, 8, 9, 10

Salinas v. U.S., 118 S.Ct. 469 (1997)..... 16

United States v. Brumley, 116 F.3d 728 (5th Cir. 1997).....12, 13

Federal Statutes

18 U.S.C. § 1962(c) 1, 9

18 U.S.C. § 1962(d) 1, 9

18 U.S.C. § 1964(c) 1, 3, 9, 10, 13

28 U.S.C. § 1254(1) 1

OPINIONS BELOW

The Fifth Circuit Court of Appeals' Opinion is unpublished (Appendix A). The Dallas District Court's Finding is also unpublished (Appendix B).

JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Fifth Circuit dated and entered on July 28, 2000. A timely petition for rehearing was filed on August 11, 2000, and denied on September 25, 2000. This petition was filed within ninety days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 1964(c) "civil RICO".

STATUTORY PROVISIONS

The RICO statute 18 U.S.C. § 1961 *et seq.* is voluminous. Only the relevant sections of RICO, i.e. 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1964(c) "civil RICO" are reproduced as Appendix F.

STATEMENT OF THE CASE

Petitioner Birnbaum filed suit under 18 U.S.C. § 1964(c) "civil RICO" alleging he was the victim of a scheme of entering fraudulent state court suits for the purpose of extorting legal fees, and presented a 183 paragraph 34 page petition accompanied by an affidavit with

104 exhibits detailing the scheme. The district court dismissed this cause by the granting of individual motions to dismiss under FRCP 12(b)(6) upon each defendant separately, thereby de facto dismissing the civil RICO cause.

The district court denied discovery and there never was a hearing. The question is whether it was legislative intent to allow such individual dismissals upon individual motions, or whether civil RICO requires a finding by a jury upon the totality of the evidence, including the falsities in the individual motions to dismiss.

The scheme is fully presented in Birnbaum's First Amended Complaint in the district court, not attached. The below presents the essence of that complaint in light of the evidence in the 104 exhibits, as is appropriate to a FRCP 12(b)(6) dismissal.

I. The Facts.

In the summer of 1994 an adjoining landowner by the name of William B. Jones, on his property, killed beavers, blew up their dams, drained and bulldozed the area, and went to an attorney named Richard Ray complaining of beavers. Attorney Ray, knowing that beavers did not provide him with a cause of action, proceeded to create himself a fraudulent cause of action under Section 11.086 of the Texas Water Code, alleging that Petitioner Birnbaum, as a person, had in 1994 built a dam supposedly having caused such flooding.

Neither Birnbaum nor anyone else had built such dam. Neither Jones nor anyone else had told Ray that

Birnbaum had built such dam. Jones' complaint had been about beavers.

Birnbaum appeared pro se in the state court and complained loudly about Ray's fabrications. Thereupon the whole process in the state court became a must-win conspiracy against Birnbaum for being a pro se who was speaking out about corruption in that state court. One after another the defendants abused their positions, each in their own way, fully knowing that they were facilitating a must-win conspiracy and scheme to defraud Birnbaum of honest judicial service. Ray knew from the beginning of his scheme upon Birnbaum that others could and would thus assist him.

The case came to trial May 26-29 of 1998, with the jury finding unanimously that Birnbaum had caused exactly zero damage to Jones. Ray had, however, schemed to sneak in a question about legal fees not permitted under his cause of action, and upon this fraudulent question proceeded to seek judgment against Birnbaum in the amount of $10,000 for legal fees.

The Court set hearing after hearing for "entry of judgment" against Birnbaum, but never entered nor denied judgment, leaving Birnbaum vulnerable, with the scheme still ongoing as of this date, more than two (2) years after the verdict.

II. The Proceedings Below.

On March 30, 1999, Birnbaum filed suit in the Dallas Federal Court under 18 U.S.C. § 1964(c) ("civil RICO") alleging the scheme to deprive him of honest judicial

service for the purpose of extorting legal fees from him, and naming as defendants ten (10) persons who had participated directly or indirectly in that scheme.

All defendants filed FRCP 12(b)(6) motions to dismiss claiming various types of immunity from Birnbaum's RICO claims. On September 7, 1999, without any discovery and without ever a hearing, the Magistrate issued Findings, Conclusions, and Recommendations (Appendix B) to which Birnbaum timely objected on September 17, 1999, seeking a de novo determination by the District Judge. On September 20, 1999 the District Judge, without ever a hearing, issued judgment (Appendix C) dismissing each defendant individually from the civil RICO cause, and de facto finding that there was no RICO enterprise. On October 14, 1999 Birnbaum appealed to the Fifth Circuit.

Birnbaum submitted a Brief to the Fifth Circuit upon ten (10) appeals issues to show that the RICO statute, under case law and the rules of procedure, did not allow the district judge to make a finding of the absence of a RICO violation anymore than it allowed him to make a finding that the defendants had indeed violated RICO. The issues presented were as follows:

- Whether the order from which appeal is taken in this civil RICO case is appealable based on the termination of the litigation, or whether there exists some other basis of appellate jurisdiction

- Whether Plaintiff's Complaint gave fair notice and rested on more than conclusions alone

- Whether the Defendants deceived the Court and failed to engage the issues in the plaintiff's Complaint
- Whether the Plaintiff's "Schultea" Reply was tailored to the defense of immunity and supported with sufficient precision and factual specificity to raise a genuine issue as to the illegality of the defendants' conduct at the time of the alleged acts
- Whether the Court failed to determine what the current applicable law was, and what the real facts were
- Whether the law was clearly established at the time of the alleged violations
- Whether the Court erred in using 12(b)(6) in dismissing a RICO complaint alleging intentional judicial trespassing
- Whether the Court erred in not addressing the injunctive relief sought by Plaintiff
- Whether the Magistrate did not look beyond the Defendants' lies for his Findings
- Whether the Court erred in not abiding by the rules of procedure

Without addressing any of Birnbaum's ten (10) briefing issues the Fifth Circuit on July 28, 2000 *sua sponte* found that Birnbaum's Civil RICO cause against the ten (10) defendants was, under the *Rooker/Feldman* doctrine, an impermissible collateral attack against a supposed state court judgment in the *Jones v. Birnbaum* beaver matter. (Appendix A)

In sum, the Fifth Circuit in its opinion never reached Birnbaum's appeals issue as to whether the district judge

was allowed to make the inference that there was no RICO enterprise.

And on September 25, 1999 the Fifth Circuit denied Birnbaum's petition for a rehearing (Appendix E) upon the *Rooker/Feldman* issue, an issue on which it had not been briefed, and of which the District Court had made no finding.

REASONS FOR GRANTING CERTIORARI TO QUESTION 1

I. The Appeals Court's decision that the *Rooker/Feldman* doctrine bars this civil RICO cause conflicts with the legislative intent of RICO as expressed in this Court's *Rotella v. Wood*. ("*The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general', dedicated to eliminating racketeering activity.*")

The Appeals Court, upon appeal of a FRCP 12(b)(6) dismissal, *sua sponte* made a finding (Appendix A) diametrically opposed to Birnbaum's civil RICO allegations. The entire finding (less title and citations) by the Fifth Circuit is:

> Udo Birnbaum challenges, pro se, the dismissal, for failure to state a claim under FED. R. Civ. P. 12(b)(6), of his Racketeer Influenced and Corrupt Organizations Act (RICO) complaint. Birnbaum's RICO action arises out of a state-court action brought against him by defendant William Jones. Birnbaum's action is an attempt to attack collaterally the validity of an adverse

> state-court judgment. Federal courts lack jurisdiction to engage in appellate review of state-court determinations. (citation omitted).
>
> When issues raised in a federal court are inextricably intertwined with a state judgment and the court is in essence being called upon to review the state-court decision, the court lacks subject matter jurisdiction. (citation omitted)
>
> Because Birnbaum's claims arise solely from the state-court litigation and are "inextricably intertwined" with the state court's judgment, the district court judgment is AFFIRMED.

Birnbaum's civil RICO complaint was upon a scheme to deprive of honest service, by among other acts *lack of a judgment* upon the verdict of a jury finding zero damages, so as to release him from the ongoing RICO scheme. There was not even a claim by any of the defendants that there was a state-court judgment, no appeals briefing that such existed, and certainly no finding thereof by the District Court. The Fifth Circuit just "found" such. Then, without addressing the appeals issue of whether the District Judge could make such finding as he did, i.e. the dismissal of all defendants individually, the Fifth Circuit affirmed such without any reference whatsoever to the subject matter of the District Court's finding.

But even assuming that such a state-court judgment existed, which it does not, the issues in the state-court were entirely different from those in the federal civil RICO cause. At issue in the state-court *Jones v. Birnbaum* was whether Jones was damaged by flooding. At issue in the civil RICO cause was whether there was an illicit

RICO scheme among ten (10) defendants, and whether Birnbaum was damaged by such scheme.

The Fifth Circuit quoted *Liedtke*, 18 F.3d 315 (5th Cir. 1994), to support its finding. But *Liedtke* itself states just exactly why the *Rooker/Feldman* doctrine does not apply to a civil RICO cause, namely because RICO itself specifically provides a cause of action:

> Absent specific law otherwise providing, that doctrine [*Rooker/Feldman*] directs that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments. Constitutional questions arising in state proceedings are to be resolved by the state courts. If a state trial court errs the judgment is not void, it is to be reviewed and corrected by the appropriate state appellate court. The casting of a complaint in the form of a civil rights action cannot circumvent this rule, as absent a specific delegation "federal district court[s], as court[s] of original jurisdiction, lack [ ] appellate jurisdiction to review, modify, or nullify final order[s] of state court[s]." *Liedtke v. State Bar of Texas*, 18 F.3d 315 (5th Cir. 1994).

RICO is not a *"constitutional question"*. Neither is it a *"civil rights action"*, nor a new theory of recovery upon *"errors"*. It is statutory law (18 U.S.C. § 1961 *et. seq.*) *"specifically providing"* how, where, and upon what issue a plaintiff shall be heard:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

> enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c).
>
> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. 18 U.S.C. § 1962(d).
>
> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. (18 U.S.C. § 1964(c), "civil RICO").

But even assuming that such a judgment existed, which it does not, the *Rooker/Feldman* doctrine does not apply to this civil RICO cause, for the federal court would not have to *"review, modify, or nullify"* any *"final order[s] of state court[s]"* upon the beaver matter. *Liedtke v. State Bar of Texas*, 18 F.3d 315 (5th Cir. 1994).

The cause of action, the issues, the operative facts, and the defendants are entirely different. Additionally, the absence of any judgment in *Jones v. Birnbaum* is itself alleged to be an overt act in furtherance of the enterprise, and plaintiff's appeal is upon FRCP Rule 12(b)(6) dismissals and all allegations are to be accepted as true and viewed in light most favorable to the plaintiff, including the allegation that there is no state court judgment.

II. Whether 18 U.S.C. § 1964(c) "civil RICO" permits the use of the *Rooker/Feldman* doctrine to keep a plaintiff from showing his cause is an important issue of federal Law that this Court should establish

The congressional objective in enacting RICO is clear. This Court, in comparing civil RICO to the Clayton Act, found that:

> "Both statutes share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into **prosecutors, "private attorneys general"**, dedicated to eliminating racketeering activity. *Klehr*, 521 U.S., at 187 (citing *Malley-Duff* at 151)(civil RICO specifically has a "further purpose [of] encouraging potential private plaintiffs diligently to investigate"). The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity, an object pursued the sooner the better." *Rotella v. Wood*, SC 98-896 Feb. 23, 2000.

The Appeals Court's decision that the *Rooker/Feldman* doctrine bars this civil RICO cause conflicts with the legislative intent of the RICO of encouraging "private attorneys general". Whether the *Rooker/Feldman* doctrine, or any other doctrine, can be used to oppose the congressional empowerment of such "private attorneys general" is an important issue of Federal Law that this Court should address.

REASONS FOR GRANTING CERTIORARI TO QUESTION 2

I. The Appeals Court's decision to affirm the granting of individual FRCP Rule 12(b)(6) motions to dismiss upon claims of immunity conflicts with this Court's opinion in *Crawford-El.* (*"This Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action"*)

The district judge erred when he strayed from the Plaintiff's cause of action under the RICO statute, *i.e.* damage by a RICO enterprise, and instead granted individual 12(b)(6) motions to dismiss based on claim of individual immunity upon their individual version of the facts. Each defendant's individual act, if looked at in isolation, may well appear "objectively reasonable", but RICO is clearly established law and immunity is merely a defense as established by this Court's *Crawford-El v. Britton,* 523 U.S 574 (1998):

> Since *Harlow's* holding related only to the scope of the affirmative defense, it provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation. *Crawford-El,* 523 U.S. 574 (1998)
>
> [T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action. *Crawford-El,* 523 U.S. 574 (1998) quoting *Gomez.* 446 U.S., at 640 (1980)

This RICO scheme is not visible by looking at only one defendant. That is why conspirators have other conspirators do their dirty work for them, each in their own way, each making their acts appear "objectively reasonable". But the jury is entitled to infer upon each defendant's connection with the other defendants and the

entire scheme. Furthermore, the jury can also find upon the falsity of the explanations put forward by a defendant, as shown by this Court's recent *Reeves* decision, which although an age discrimination case, squarely addresses the role of the jury:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [employer] was dissembling to cover up a [discriminatory] purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. *Reeves v. Sanderson Plumbing*, Supreme Court 99-536 (June 12, 2000), quoting *Wright v. West*, 505 U.S. 277, 296 (1992)

Plaintiff Birnbaum has alleged a pattern of defrauding of honest service, each defendant participating in his own particular way:

> Each such Defendant acted in violation of clear and specific constitutional or statutory provisions, for which they are properly liable. Regarding each predicate act or setting, each such Defendant participated as indicated there, each in their individual capacity, in behalf of the alleged enterprise, by not acting in their judicial, prosecutorial, administrative, or executive capacity, as would have been appropriate under the circumstances and in accordance with the oath of their Offices or duties of their positions. Plaintiff's First Amended Complaint, paragraph 26.

Such schemes to defraud of honest service have been clearly outlawed by the Fifth Circuit's *Brumley*, 116 F.3d

728, 733 (5th Cir. 1997), decision and held violative of RICO:

> In 1997, the Fifth Circuit, sitting en banc, held that, by enacting [18 U.S.C.] § 1346, Congress intended to protect the intangible right of honest services from wire fraud schemes by state actors. See *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) ("fraud statutes cover the deprivation of intangible rights."). *Brown vs. Nationsbank*, 188 F.3d 579 (5th Cir. 1999).
>
> Stated another way, "honest services" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interest of the employer – or that he consciously contemplated or intended such actions. *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997)

II. Whether 18 U.S.C. § 1964(c) "civil RICO" permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has plead all the elements of civil RICO and brought evidence of each defendant's conduct is an important Issue of Federal Law that this Court should establish

Birnbaum is seeking review of the District Court judgment granting the defendants' individual FRCP 12(b)(6) motions to dismiss, and the de facto dismissal of the civil RICO complaint in such manner.

> "A district court's dismissal of a complaint under this subsection may be upheld only if, taking the plaintiff's allegations as true, it appears that no relief could be granted based on the plaintiff's alleged facts." *Bass v. Parkwood*

> *Hosp.*, 180 F.3d 234, 240 (5th Cir. 1999), citing *Bradley v. Pucket*, 157 F.3d 1022, 1025 (5th Cir. 1998). "All well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiff." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995).

Birnbaum averred fraudulent documents and their use in a scheme to extort Birnbaum, and provided the documents themselves as 104 exhibits. Birnbaum has also alleged that all the defendants claiming absolute immunity were in fact trespassers upon him, and therefor stripped of immunity, because of their prior agreement. "All were secret agents in behalf of the enterprise and trespassers upon Birnbaum". (First Amended Complaint, par. 26)

There are, however, different levels of "fact" in a RICO environment. RICO itself legislates the material issues which sets the material facts. Below this, however, are the underlying evidentiary "facts" as to exactly what each defendant did. But then there is also the issue as to whether the individual acts constitute "predicate acts", a "pattern of racketeering activity", and an "enterprise", etc. Then there is the issue of fact of whether a certain defendant participated in a certain prohibited manner, i.e. whether he "conducted or participated in the conduct", etc. Then of course there is the issue of whether the Plaintiff was damaged by a violation of RICO.

At issue is whether the Court under a 12(b)(6) motion is required to view the allegations upon these "principal facts" also in light most favorable to the plaintiff. If it is, i.e. if it at least accepts the possibility that the plaintiff could convince a jury, then these "principal facts" are to

be accepted as true also. And if the plaintiff has properly pleaded the elements of a RICO case, then as a matter of law the defendants have violated RICO. It is that simple.

Case law tells district court trial judges, that unlike the jury, he is not allowed to draw inferences like a jury is allowed to. Case law also tells him that whether an issue needs to go to a jury turns on whether it presents a proper jury question. RICO violation is a jury question. Case law also tells the judge that he, unlike the jury, is not entitled to draw inferences from any of the documentary evidence in front of him either. Case law also tells him that summary judgment on affidavits is inappropriate when state of mind is involved, as it surely is in RICO.

Plaintiff supplemented his 183 paragraph pleading with 104 exhibits upon the averments therein. If the Court viewed all allegations as true, particularly in light of the additional inferences upon the 104 exhibits, then the defendants violated RICO, and individual FRCP 12(b)(6) dismissals are not proper.

The district judge erred when he strayed from the Plaintiff's cause of action and granted individual 12(b)(6) motions to dismiss based on claim of individual immunity upon their individual version of the facts. Immunity is merely a defense, but is not relevant to Plaintiff's Rico cause of action upon the defendants' scheme.

The Appeals Court's decision to affirm the granting of individual FRCP Rule 12(b)(6) motions to dismiss upon claims of immunity conflicts with this Court's opinion in *Crawford-El.*

Which dispositive rules of procedure, if any, can be used to preclude the showing of a civil RICO cause to a jury is an important issue of Federal Law that this Court should establish.

CONCLUSION

The legislative intent of Civil RICO is to encourage victims to turn into "private attorneys general" dedicated to eliminating racketeering activity. *(Rotella)*. A jury can find for a plaintiff upon the falsity of the explanations put forward by a defendant. *(Reeves)*. Immunity is not relevant to the existence of the plaintiff's cause of action. *(Crawford-El)*. RICO conspiracies are dangerous and punishable in themselves. *(Salinas)*.

Which doctrines, if any, and which dispositive rules of procedure, if any, can keep a civil RICO "private attorney general", having "diligently investigated" *(Rotella)*, from showing his cause to a jury is an important issue of Federal Law that this Court should resolve.

Birnbaum respectfully requests that this Court grant the petition for writ of certiorari to resolve this issue.

Respectfully submitted,

Udo Birnbaum
540 VZ 2916
Eustace, TX 75124
(903) 479-3929

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11180
Summary Calendar

UDO BIRNBAUM,

Plaintiff-Appellant,

versus

RICHARD RAY; ET AL.,

Defendants,

RICHARD RAY; TOMMY W. WALLACE; JAMES B. ZIMMERMAN; RICHARD DAVIS; PAT MCDOWELL, Judge; LESLIE P. DIXON, BETTY DAVIS; WILLIAM JONES; BECKY K. MALONE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:99-CV-696-R)
(Filed Jul. 28, 2000)

Before WIENER, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Udo Birnbaum challenges, *pro se*, the dismissal, for failure to state a claim under FED. R. CIV. P. 12(b) (6), of his Racketeer Influenced and Corrupt Organizations Act (RICO) complaint.

Birnbaum's RICO action arises out of a state-court action brought against him by defendant William Jones. Birnbaum's action is an attempt to attack collaterally the validity of an adverse state-court judgment. Federal courts lack jurisdiction to engage in appellate review of state-court determinations. ***District of Columbia Court of Appeals v. Feldman***, 460 U.S. 462, 476, 482 (1983); ***Rooker v. Fidelity Trust Co.***, 263 U.S. 413, 415 (1923); ***Liedtke v. State Bar of Texas***, 18 F.3d 315, 317 (5th Cir. 1994). "When issues raised in a federal court are inextricably intertwined with a state judgment and the court is in essence being called upon to review the state-court decision, the court lacks subject matter jurisdiction". ***Davis v. Bayless***, 70 F.3d 367, 375 (5th Cir. 1995) (internal quotation marks and citations omitted).

Because Birnbaum's claims arise solely from the state-court litigation and are "inextricably intertwined" with the state court's judgment, the district court judgment is

AFFIRMED.

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circmstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM, Plaintiff,	§	
vs.	§	No. 3:99-CV-0696-R
RICHARD L. RAY, et al, Defendants.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Sept. 7, 1999)

Pursuant to 28 U.S.C. § 636(b) and respective Orders of Reference, the following motions are before this Court for consideration:

1. *Defendants Tommy W. Wallace, James B. Zimmerman, Pat McDowell, and Leslie P. Dixon's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed April 26, 1999;

2. *Defendant Richard Davis' Motion to Dismiss Under Rule 12 (b)(6, Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading*

and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings, filed April 28, 1999;

3. *Defendant Betty Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed April 30, 1999;

4. *Defendant Richard Ray's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading,* filed April 30, 1999;

5. *Defendant William Jones' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading,* filed April 30, 1999;

6. *Defendant Becky Malone's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed May 7, 1999;

7. *Plaintiff's Motion for Leave to File Amended Complaint,* filed July 19, 1999; and

8. *Defendants Zimmerman, Wallace, McDowell, and Dixon's Amended Motion to Dismiss under Rule 12 (b)(6), Alternatively under Rule 56 for Summary Judgment, Alternatively for Abatement of this Action Including Discovery by Plaintiff until the Court has Determined the Issue of Absolute Judicial and Prosecutorial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed July 16, 1999.

No hearing is necessary on the matter. Based upon arguments in the various Motions and Responses thereto, this Court finds as follows.

FINDINGS AND CONCLUSIONS

As an initial matter, this Court finds that *Plaintiff's Motion for Leave to File Amended Complaint,* filed July 19, 1999, should be granted. However, this Court finds that even accepting the Amended Complaint, Plaintiff can not overcome the immunity issues addressed by certain Defendants in their respective arguments for dismissal and fails to state a claim on which relief can be granted for certain other Defendants addressed in their respective arguments.

Judicial Immunity

Defendants James B. Zimmerman, Tommy W. Wallace, Pat McDowell Leslie P. Dixon, Richard Davis, Betty Davis and Becky Malone move for dismissal on grounds

of judicial immunity. A judge is entitled to absolute judicial immunity from liability for damages for judicial acts performed within his or her jurisdiction. *See Pierson v. Ray*, 386 U.S. 547, 553-54, 87 S. Ct. 1213, 1217 (1967); *Mays v. Sudderth*, 97 F.3d 107, 110 (5th Cir. 1996); *Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986).

In determining whether a judge's action were "judicial in nature," the federal courts consider whether (1) the precise act complained of is a normal judicial function; (2) the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) the controversy centered around a case pending before the court; and (4) the acts arose directly out of a visit to the judge in his official capacity. *See Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993); *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). These four factors are broadly construed in favor of immunity, and the absence of one or more factors does not prevent a determination that judicial immunity applies in a particular case. *See Malina*, 994 F.2d at 1124.

Defendants Tommy W. Wallace, James Zimmerman and Pat McDowell move for dismissal on judicial immunity grounds. The Plaintiff's claims against these Defendants all derive from their service as judges in Plaintiff's case and their actions during the court proceedings. Even considering Plaintiff's Amended Complaint, there are no specific facts and no proper evidence showing that Judges Zimmerman, Wallace, or McDowell, have ever engaged in any act or omission regarding Plaintiff outside the course and scope of their official duties as judicial officers. In fact, even Plaintiff's Amended Complaint

presents nothing more than conclusory Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, violations which do not present this court with proper factual allegations to find the Judges' actions against the Plaintiff to have been outside the scope of their official capacity.

Defendant Richard Davis also moves for dismissal on judicial immunity grounds because all of Plaintiff's claims against him derive from his service as a court appointed mediator in Plaintiff's case and his actions, therefore, were as an "arm of the court." *See Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S. Ct. 1108, 1115 (1983). Specifically, the only acts Plaintiff argues against Davis are conclusory violations of RICO. Plaintiff alleges no specific facts and has proffered no evidence, demonstrating that defendant Davis has ever engaged in any act or omission with regard to Plaintiff except while acting within the course and scope of his official duties as a court-appointed mediator. Accordingly, this Court finds that Defendant Richard Davis' Motion to Dismiss should be granted.

Likewise, Defendant Betty Davis moves this Court for dismissal on judicial immunity grounds because all of Plaintiff's claims against him derive from her performance as a court coordinator. Again, as was the case with Defendant Richard Davis, the only acts Plaintiff alleges against Defendant Betty Davis are mere conclusory violations of RICO. Plaintiff alleges no specific facts and has proffered no evidence, demonstrating that Defendant Betty Davis has ever engaged in any act or omission with regard to Plaintiff except while acting within the course and scope of her official duties as a court coordinator.

Accordingly, this court finds that Defendant Betty Davis' Motion to Dismiss should be granted.

Similar to Defendant Richard Davis and Betty Davis, Defendant Becky Malone also moves for dismissal on judicial immunity grounds because all of Plaintiff's claims against her derive from her performance as a court reporter. Again, the only acts Plaintiff alleges against Defendant Becky Malone are mere conclusory violations of RICO. Plaintiff alleges no specific facts and has proffered no evidence, demonstrating that Defendant Becky Malone has ever engaged in any act or omission with regard to Plaintiff except while acting within the course and scope of her official duties as a court reporter. Thus, this Court finds that Defendant Becky Malone's Motion to Dismiss should be granted.

Prosecutorial Immunity

Defendant Leslie Dixon is a district attorney and moves for dismissal on grounds of prosecutorial immunity. According to the United States Supreme court, a "prosecutor enjoys absolute immunity from civil suit for damages in initiating a prosecution and presenting the State's case. *See Imbler v. Pactman,* 424 U.S. 409 (1976). Plaintiff Birnbaum alleges that Dixon lied in court. Even assuming arguendo that Dixon faced liability, Plaintiff offers no specificity as to what Dixon lied about, nor evidence to support his allegations.

Failure to State a Claim

Defendant William Jones moves for dismissal for Plaintiff's failure to state a claim against him. Plaintiff's claims against Defendant Jones, even considering his Amended Complaint, do not contain even a single fact which would support the allegation that Defendant Jones did in fact enter into any conspiracy. Therefore, this Court recommends that Defendant William Jones' Motion to Dismiss should be granted.

Defendant Richard Ray who was Defendant William Jones' attorney in the litigation between Plaintiff and Defendant Ray also moves for dismissal for Defendant's failure to state a claim against him. The Plaintiff claims Defendant Ray was involved in a conspiracy in violation of RICO. Again, neither Plaintiff's Complaint nor Amended Complaint allege facts to support Plaintiff's allegation against Defendant Ray. This Court recommends Defendant Richard Ray's Motion to Dismiss be granted.

RECOMMENDATION

Based on the foregoing, this Court initially recommends that *Plaintiff's Motion for Leave to File Amended Complaint,* filed July 19, 1999, **be granted.** This Court further recommends that *Defendant Tommy W. Wallace, James B. Zimmerman, Pat McDowell, and Leslie P. Dixon's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants'*

Motion for Dismissal on the Plaintiff's Pleadings, filed April 26, 1999, **be granted;** *Defendant Richard Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed April 28, 1999, **be granted;** *Defendant Betty Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed April 30, 1999, **be granted;** *Defendant Richard Ray's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies with the Rules of Pleading,* filed April 30, 1999, **be granted;** *Defendant William Jones' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading,* filed April 30, 1999, **be granted;** *Defendant Becky Malone's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed May 7, 1999, **be granted;** and *Defendants Zimmerman, Wallace, McDowell, and Dixon's Amended*

Motion to Dismiss under Rule 12 (b)(6), Alternatively under Rule 56 for Summary Judgment, Alternatively for Abatement of this Action Including Discovery by Plaintiff until the Court has Determined the Issue of Absolute Judicial and Prosecutorial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings, filed July 16, 1999, **be denied as moot.**

SO RECOMMENDED this 7 day of September, 1999.

/s/ Paul D. Stickney
PAUL D. STICKNEY
United States
Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM, Plaintiff,	§	
vs.	§	No. 3:99-CV-0696-R
RICHARD L. RAY, et al, Defendants.	§	

JUDGMENT

(Filed Sep. 21, 1999)

The Court has heretofore entered its Findings in this case, and it is therefore

ORDERED, ADJUDGED, AND DECREED that Plaintiff Udo Birnbaum's *Motion for Leave to Amend Complaint* is **GRANTED** and

1. *Defendants Tommy W. Wallace, James B. Zimmerman, Pat McDowell, and Leslie P. Dixon's Motion to Dismiss Under Rule 12(b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings;*

2. *Defendant Richard Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with*

the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings;

3. *Defendant Betty Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings;*

4. *Defendant Richard Ray's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading;*

5. *Defendant William Jones' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading;*

6. *Defendant Becky Malone's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings*

are **GRANTED** and *Defendants Zimmerman, Wallace, McDowell, and Dixon's Amended Motion to Dismiss under Rule 12 (b)(6), Alternatively under Rule 56 for Summary*

Judgment, Alternatively for Abatement of this Action Including Discovery by Plaintiff until the Court has Determined the Issue of Absolute Judicial and Prosecutorial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings is **DENIED AS MOOT.**

SO ORDERED this 20 day of September, 1999.

/s/ Jerry Buchmeyer
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM,	§	
Plaintiff,	§	
	§	
VS.	§	**No. 3:99-CV-0696-R**
RICHARD L. RAY, et. al.,	§	
	§	
Defendants.	§	

ORDER

(Filed Sep. 27, 1999)

The PLAINTIFF'S OBJECTIONS TO FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (filed September 17, 1999) are without merit, and they are OVERRULED.

ENTERED: SEPTEMBER 24, 1999

/s/ Jerry Buchmeyer
JERRY BUCHMEYER,
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11180

UDO BIRNBAUM

Plaintiff-Appellant

v.

RICHARD RAY; ET AL

Defendants

RICHARD RAY; TOMMY W WALLACE; JAMES B ZIMMERMANN; RICHARD DAVIS; PAT MCDOWELL, Judge; LESLIE P DIXON; BETTY DAVIS; WILLIAM JONES; BECKY K MALONE

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

ON PETITION FOR REHEARING

(Filed Sep. 25, 2000)

Before WIENER, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

The alternative request for a stay of the mandate is DENIED.

ENTERED FOR THE COURT:

/s/ Barksdale
United States Circuit Judge

APPENDIX F

STATUTORY PROVISIONS

18 U.S.C. § 1961, et. seq. ("RICO") provides, in relevant part:

18 U.S.C. § 1962(c):

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(d):

"It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964(c), "Civil RICO":

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(2)

Supreme Court, U.S.
FILED
JAN 16 2001
OFFICE OF THE CLERK

No. 00-982

IN THE

Supreme Court of the United States

UDO BIRNBAUM,

Petitioner,

v.

RICHARD RAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BETTY DAVIS AND BECKY MALONE

ROBERT S. DAVIS
Counsel of Record
FLOWERS DAVIS, L.L.P.
Attorneys for Respondents
Betty Davis and Becky Malone
815 Rice Road
Tyler, Texas 75703
(903) 534-8063

164645

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

24pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Reasons for Denying the Writ	1
Statement of the Case	1
Course of Proceedings and Dispositions Below	1
Statement of Facts	2
Arguments	3
Birnbaum's First Argument	3
Respondents' Response to First Argument	4
Birnbaum's Second Argument	6
Respondents' Response to Second Argument	6
Birnbaum's Third Argument	8
Respondents' Response to Third Argument	8
Birnbaum's Fourth Argument	12
Respondents' Response to Fourth Argument	12
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Bogney v. Jones, 904 F.2d 272 (5th Cir. 1990) 8

Brown v. NationsBank Corp., 188 F.3d 579 (5th Cir. 1999) 9

Byrd v. Woodruff, 891 S.W.2d 689 (Tex. App. – Dallas 1994, writ denied) 10, 11

Chappell v. Robbins, 73 F.3d 918 (9th Cir. 1996) .. 13

Cleavinger v. Saxner, 474 U.S. 193, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985) 10

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) 8

Cook v. Reno, 74 F.3d 97 (5th Cir. 1996) 4

Cooper v. Parrish, 203 F.3d 937 (6th Cir. 2000) ... 9

Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) 8, 11

Crowe v. Henry, 115 F.3d 294 (5th Cir. 1997) 15

Davis v. Bayless, 70 F.3d 367 (5th Cir. 1995) 9

Delcourt v. Silverman, 919 S.W.2d 777 (Tex. App. – Houston [14th Dist.] 1996, writ denied) 11

Cited Authorities

Page

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) ..... *passim*

Garry v. Geils, 82 F.3d 1362 (7th Cir. 1996) 5

H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) 13, 14

Jordahl v. Democratic Party of Va., 122 F.3d 192 (4th Cir. 1997) 5

Juidice v. Vail, 430 U.S. 327, 97 S. Ct. 1211, 51 L. Ed. 2d 376 (1977) 4

Kamilewicz v. Bank of Boston, 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997) 6, 8

Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404 (5th Cir.), *cert. denied*, 498 U.S. 895, 111 S. Ct. 244, 112 L. Ed. 2d 203 (1990) 15

Langford v. Rite-Aid of Alabama, Inc., 231 F.3d 1308, (11th Cir. 2000) 13

Lovelace v. Software Spectrum, Inc., 78 F.3d 1015 (5th Cir. 1996) 15

Cited Authorities

Page

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963) 4

McLaughlin v. Anderson, 962 F.2d 187 (2d Cir. 1992) 14

Melder v. Morris, 27 F.3d 1097 (5th Cir. 1994) 16

Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) 11, 12

Mylett v. Mullican, 992 F.2d 1347 (5th Cir. 1993) .. 10

O'Neal v. Mississippi State Board of Nursing, 113 F.3d 62 (5th Cir. 1997) 10

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) 5

Ritter v. Ross, 992 F.2d 750 (7th Cir. 1993) 5

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 2d 362 (1923) ..... *passim*

Rotella v. Wood, 528 U.S. 549, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) 3, 7

Ruhrgas v. Marathon Oil Co., 526 U.S. 574, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999) 4

Cited Authorities

	Page
Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992)	4
Stachon v. United Consumers Club, Inc., 229 F.3d 673 (7th Cir. 2000)	13
Stegmaier v. Trammell, 597 F.2d 1027 (5th Cir. 1979)	4
Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)	10
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)	7
Statutes:	
18 U.S.C. § 1341	15
18 U.S.C. § 1961 *et seq.*	1, 3
18 U.S.C. § 1961(1)	15
18 U.S.C. § 1961(5)	13, 14
18 U.S.C. § 1962(c)	14
18 U.S.C. § 1962(d)	14
18 U.S.C. § 1964(c)	6, 12

Cited Authorities

Page

Rules:

FED. R. CIV. P. 1 13

FED. R. CIV. P. 9(b) 9, 12, 15, 16

FED. R. CIV. P. 12(b)(6) 1, 8, 9, 12, 13

FED. R. CIV. P. 81 13

REASONS FOR DENYING THE WRIT

Respondents Betty Davis and Becky Malone would respectfully show unto this Honorable Court that Petitioner Birnbaum's arguments are without merit. The United States Court of Appeals for the Fifth Circuit correctly affirmed the District Court's dismissal of Birnbaum's claims, whether due to lack of jurisdiction or for Birnbaum's failure to state a claim upon which relief could be granted. Further, neither the legislative intent of Congress nor previous decisions of this Court prohibit the dismissal of civil RICO claims pursuant to either the *Rooker/Feldman* Doctrine or Federal Rule of Civil Procedure 12(b)(6).

STATEMENT OF THE CASE

In his Petition for Writ of Certiorari, Petitioner Birnbaum (hereinafter "Birnbaum") has misstated the facts of this litigation. Respondents Betty Davis and Becky Malone submit the following summary of facts relevant to this Court's decision.

COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW

On March 30, 1999, Birnbaum filed his Complaint alleging numerous violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, by ten defendants. Nine defendants, including Betty Davis and Becky Malone, filed motions to dismiss or alternatively to abate the proceedings. The tenth defendant, Kerry Young, filed a motion for summary judgment. Birnbaum amended his petition. Thereafter, United States Magistrate Judge Stickney filed Findings, Conclusions, and

Recommendation regarding the dispositive motions. The District Court adopted the Magistrate Judge's findings and dismissed Birnbaum's complaint for failure to state a claim.

On October 14, 1999, Birnbaum filed a notice of appeal, seeking review of the District Court judgment. In an unpublished opinion, the Fifth Circuit affirmed the District Court's judgment on the ground that the District Court had been without jurisdiction to entertain Birnbaum's claim. Relying on this Court's opinions in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 44 S. Ct. 149, 68 L. Ed. 2d 362 (1923), the Fifth Circuit noted that a federal district court lacks subject matter jurisdiction to review state-court litigation and issues inextricably intertwined with that litigation. The Fifth Circuit affirmed the District Court's judgment, finding that Birnbaum's federal claims arose solely from state-court litigation and were inextricably intertwined with the state-court litigation.

STATEMENT OF FACTS

William Jones and Birnbaum were neighbors in Van Zandt County, Texas. This litigation arises from a dispute involving a beaver dam on Birnbaum's property. Jones, with the assistance of his attorney, Richard Ray, sued Birnbaum in 1994 under the Texas Water Code in the hope of causing Birnbaum to remove the dam and recovering damages from Birnbaum for damages caused to Jones's real property by the dam (the "Beaver Dam Case"). The suit was filed in the 294th Judicial District Court of Van Zandt County, Texas. At trial, a jury determined that Birnbaum allowed a dam or dams

on his property to cause upstream flooding on Jones's property. The jury awarded no damages to Jones, but awarded him $10,000 in attorney's fees. Birnbaum was unsatisfied with the trial court action, and filed the instant suit in federal district court. Among other things, Birnbaum alleged that the defendants "attempted to enrich themselves by using their relationships in the Court to extort legal fees, moneys, and other valuable things, by the use of fraudulent documents, arguments, and corrupt court process as weapons for malicious prosecution." For cause of action, Birnbaum alleged that the defendants violated 18 U.S.C. § 1961 *et seq.* (civil RICO) by engaging in racketeering activity, conspiracy, and fraud.

Birnbaum asserted numerous specific acts of misconduct on the part of Respondents Betty Davis, Court Coordinator, and Becky Malone, Court Reporter. Birnbaum's sole allegations against Betty Davis concerned the issuance or non-issuance of notices and the relaying of simple information about the Beaver Dam Case. All of the alleged activities were patently "judicial" in nature. The allegation against Malone was that she simply had no record of a transcript of a hearing or hearings.

ARGUMENTS

BIRNBAUM'S FIRST ARGUMENT:

1. The Appeals Court's decision that the *Rooker/Feldman* doctrine bars this civil RICO cause conflicts with the legislative intent of RICO as expressed in this Court's *Rotella v. Wood*. ("*The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity.*")

RESPONDENTS' RESPONSE:

Petitioner Birnbaum makes three discernible arguments in his initial issue. First, Birnbaum contends that the Fifth Circuit erred by deciding his case on different grounds than those relied upon by the federal district court. Second, Birnbaum asserts that the issues in the state-court case were "entirely different" from those in the federal litigation and were not "inextricably intertwined" as determined by the Fifth Circuit. Third, Birnbaum asserts that the Fifth Circuit's *Rooker/Feldman* Doctrine dismissal of his appeal was inappropriate because civil RICO is a statutory cause of action, and not subject to *Rooker/Feldman*. Each of these contentions is erroneous, and Respondents Davis and Malone will address each one in turn.

The Fifth Circuit was entitled to affirm the district court's dismissal on any proper ground. *See Sojourner T. v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992); *Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir. 1979). Indeed, it was incumbent upon the Fifth Circuit to initially address the district court's jurisdiction, as issues of subject matter jurisdiction must precede any determination of the merits of a case. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S. Ct. 1563, 1569, 143 L. Ed. 2d 760 (1999); *Cook v. Reno*, 74 F.3d 97, 99 (5th Cir. 1996). Jurisdictional issues, particularly the Article III case or controversy requirement, should be examined on appeal even if not raised by the parties or the court below. *See Juidice v. Vail*, 430 U.S. 327, 331, 97 S. Ct. 1211, 1215, 51 L. Ed. 2d 376 (1977); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16, 83 S. Ct. 671, 674, 9 L. Ed. 2d 547 (1963). Therefore, the Fifth Circuit did not err in affirming the District Court's judgment on different grounds than those relied upon by that court.

Contrary to his assertion in this Court, Birnbaum's civil RICO issues were inextricably intertwined with the state-court action. The *Rooker/Feldman* Doctrine precludes lower federal courts from exercising jurisdiction over claims that would require them to review a state-court action. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483, 103 S. Ct. 1303, 1316, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 150, 68 L. Ed. 2d 362 (1923). Review of a state-court action is possible only in the state-court system and then to the United States Supreme Court. *Garry v. Geils*, 82 F.3d 1362, 1366 (7th Cir. 1996). The Doctrine bars federal district court review of claims that were actually raised in state court and those claims that are inextricably intertwined with state-court determinations. *Ritter v. Ross*, 992 F.2d 750, 753 (7th Cir. 1993). The key inquiry is whether "the district court is in essence being called upon to review the state-court decision." *Feldman*, 460 U.S. at 483-84 n.16, 103 S. Ct. 1316 n.16. If adjudication of a claim in federal court would require the court to determine that a state-court judgment was erroneously entered or was void, the claim is inextricably intertwined with the merits of the state-court judgment. *See, e.g., Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 202 (4th Cir. 1997). "Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) (Marshall, J., concurring).

The Fifth Circuit correctly determined that Birnbaum's federal claims were inextricably intertwined with the state-court action. Birnbaum's entire federal complaint relies on

the assertion that the state-court proceeding is void because of the racketeering activities of Respondents Davis, Malone, and others. In order to grant Birnbaum relief on his civil RICO claim, the federal district court would have had to review the state-court proceedings and determine that they were fraudulent and therefore void. Birnbaum's state action and federal claims were inextricably intertwined, and the Fifth Circuit correctly affirmed dismissal of Birnbaum's complaint on *Rooker/Feldman* grounds.

Birnbaum also asserts that the *Rooker/Feldman* Doctrine is inapplicable to his RICO claims because civil RICO is a statutory cause of action. This contention is unsupported by any authority. Further, this Court has given at least tacit approval to the dismissal of RICO claims pursuant to the *Rooker/Feldman* Doctrine by denying a writ of certiorari in such a case. *See Kamilewicz v. Bank of Boston*, 92 F.3d 506, 512 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997) (federal appellate court affirmed a district court's dismissal of RICO claims on grounds of lack of jurisdiction pursuant to the *Rooker/ Feldman* Doctrine, and this Court denied certiorari).

BIRNBAUM'S SECOND ARGUMENT:

2. Whether 18 U.S.C. § 1964(c) "civil RICO" permits the use of the *Rooker/Feldman* Doctrine to keep plaintiff from showing his cause is an important issue of federal law that this Court should establish.

RESPONDENTS' RESPONSE:

Birnbaum has confused this Court's holdings regarding Congress's intent in establishing a civil cause of action for

victims of racketeering. He insists that Congress's legislative intent in enacting civil RICO prohibits the Fifth Circuit's use of the *Rooker/Feldman* Doctrine to "keep a plaintiff from showing his cause." Birnbaum relies on this Court's statements in *Rotella v. Wood* for support of his allegations. That reliance is misplaced.

Birnbaum's reliance on *Rotella* and previous Clayton Act decisions is confused. Neither *Rotella* nor any Clayton Act decision prohibits a finding that the *Rooker/Feldman* Doctrine precludes federal district court jurisdiction, and Birnbaum has cited none. *Rotella* teaches that "there is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration." *Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. 1075, 1082, 145 L. Ed. 2d 1047 (2000). "Both statutes share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices." *Id.* Therefore, this Court used previous holdings in Clayton Act cases to determine that the "injury and pattern discovery rule" did not govern the start of the limitations period for civil RICO claims. 120 S. Ct. at 1082-83. In fact, the Court used Clayton Act precedent to bar recovery for Rotella and other RICO plaintiffs who did not discover a pattern of racketeering practices within the applicable four-year statute of limitations. *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 806, 28 L. Ed. 2d 77 (1971). *Rotella* does not address the *Rooker/Feldman* Doctrine.

Birnbaum particularly relies upon this Court's statement that "[t]he object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering

activity." However, he cites no authority for his conclusion that this object of RICO allows a private RICO plaintiff to challenge a state-court decision in federal district court. Federal RICO statutes do not provide a vehicle to attack state-court judgments nor to sanction the conduct of state-court judges taken within the scope of their judicial authority. *See Bogney v. Jones*, 904 F.2d 272, 274 (5th Cir. 1990); *see also Kamilewicz v. Bank of Boston*, 92 F.3d 506, 512 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997) (affirming district court's dismissal of RICO claims on grounds of lack of jurisdiction pursuant to the *Rooker/Feldman* Doctrine).

BIRNBAUM'S THIRD ARGUMENT:

3. The Appeals Court's decision to affirm the granting of individual FRCP Rule 12(b)(6) motions to dismiss upon claims of immunity conflicts with this Court's opinion in *Crawford-El.* ("*This Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action.*")

RESPONDENTS' RESPONSE:

Contrary to Birnbaum's assertion, a federal district court may dismiss a plaintiff's cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the defendant enjoys immunity from suit. A court may dismiss a complaint under Rule 12(b)(6) where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). Where a defendant's immunity from suit precludes the plaintiff's claim, a court may properly dismiss the plaintiff's

claim pursuant to Rule 12(b)(6). *See, e.g.*, *Cooper v. Parrish*, 203 F.3d 937, 946 (6th Cir. 2000) (district court properly dismissed plaintiff's claim pursuant to Rule 12(b)(6) on ground of judicial immunity); *Brown v. NationsBank Corp.*, 188 F.3d 579, 588 (5th Cir. 1999) (applying immunity to civil RICO case); *Davis v. Bayless*, 70 F.3d 367, 376 (5th Cir. 1995) (affirming district court's Rule 12(b)(6) dismissal of court-appointed receiver on grounds of judicial immunity).

Birnbaum contended that certain alleged, isolated events on the part of Davis and Malone made them racketeers. The sole allegations against Betty Davis regarded issuance or non-issuance of notices and the relaying of simple information about the Beaver Dam Case. Specifically, Birnbaum complained of the following: (1) issuance of notice of a pretrial conference instead of a trial; (2) informing Birnbaum that his opponent's Motion for Default Judgment was moot; (3) failing to set a hearing on a Petition addressed to the United States Department of Justice; (4) failing to issue an Order of Recusal or Order of Referral of the Motion for Recusal; (5) failing to send a notice that the administrative judge had appointed a new judge; (6) failing to issue a notice that the judge had made a notation on the docket that a mediator had been appointed; (7) issuing a notice of hearing despite the fact that no motion had been filed; (8) upon "information and belief," backdating a notice of setting for trial; (9) failing to issue a notice of a hearing on recusal; and (10) using the wrong words "motion for entry of judgment" in a notice concerning a hearing on a "Motion for Judgment on Verdict." All of these activities are patently "judicial" in nature. The allegation against Malone is that she simply had no record of a transcript of a hearing or hearings. These are precisely the kind of allegations that Rule 12(b)(6), Rule 9(b), and the doctrines of judicial and qualified immunity were designed to prevent.

"It is generally understood that a judge, and those similarly situated, have absolute immunity for judicial acts." *Mylett v. Mullican*, 992 F.2d 1347, 1352 (5th Cir. 1993). Courts examine the character of a governmental officer's duties and the relationship to the parties when determining whether he or she is entitled to absolute immunity. *Id.* (citing *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)). "If the functions are of a judicial nature then we must weigh the costs and benefits of denying or affording absolute immunity." *O'Neal v. Mississippi State Board of Nursing*, 113 F.3d 62, 65 (5th Cir. 1997). The following six factors are characteristics of the judicial process and are instructive in determining whether a defendants is entitled to absolute immunity: (1) the need to assure that the individual can perform his functions without harassment or intimidation; (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent; (5) the adversarial nature of the process; and (6) the correctability of error on appeal. *See id.* (citing *Cleavinger v. Saxner*, 474 U.S. 193, 202, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985)). "No one factor is controlling and the list of considerations is not intended to be exclusive." *Mylett*, 992 F.2d at 1353.

In *Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App. – Dallas 1994, writ denied), the court of appeals explained the doctrine of derived judicial immunity in Texas as follows:

> Judges are immune from tort liability for acts performed or not performed in the course of judicial proceedings over which they have jurisdiction. *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (1961). When judges delegate

> their authority or appoint persons to perform services for the court, their judicial immunity may follow that delegation or appointment. In Texas, judicial immunity applies to officers of the court who are integral parts of the judicial process, such as a prosecutor performing typical prosecutorial functions, court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees. . . .

891 S.W.2d at 707; *see also Delcourt v. Silverman*, 919 S.W.2d 777, 782 (Tex. App. – Houston [14th Dist.] 1996, writ denied) (policy underlying derived judicial immunity is to prevent harassment and intimidation that might otherwise result if disgruntled litigants could vent anger by suing person who either presents decision-maker with adverse information or renders adverse opinion).

Further, this Court's opinion in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), is misplaced. *Crawford-El* did not address Rule 12(b)(6) dismissal on immunity grounds. To the contrary, *Crawford-El* discussed the relative summary judgment burden on the parties in a civil rights claim that required proof of motive. 523 U.S. at 598, 118 S. Ct. at 1596-97. *Crawford-El* is inapposite to the present case.

With respect to each of the alleged acts of misconduct, Davis and Malone were clearly performing official duties as Court Coordinator and Court Reporter, respectively, for the 294th Judicial District Court. If particular acts are scrutinized in isolation, then any alleged mistake by a judicial actor in excess of his or her authority would become a "nonjudicial" act. *See Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S. Ct. 286,

2881, 116 L. Ed. 2d 9 (1991). None of the allegations concerning Davis and Malone, however they are scrutinized, meets the pleading requirements of Rule 9(b). As the District Court correctly decided, Birnbaum should not be able to surmount the pleading requirements and Respondents' entitlement to judicial immunity by offering only wild allegations and a clear misunderstanding of the litigation process and Respondents' duties.

The District Court did not err in determining that Respondents were entitled to judicial immunity from Birnbaum's claims.

BIRNBAUM'S FOURTH ARGUMENT:

4. Whether 18 U.S.C. § 1964(c) "civil RICO" permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has plead all the elements of civil RICO and brought evidence of each defendant's conduct is an important Issue of Federal Law that this Court should establish.

RESPONDENTS' RESPONSE:

Rule 12(b)(6), and indeed all of the Federal Rules of Civil Procedure, apply to civil RICO actions. Federal Rule of Civil Procedure 1 provides:

> These rules govern the procedures in the United States district courts in all suits of a civil nature whether cognizable as cases of law or in equity or in admiralty, with the exceptions stated in Rule 81.

FED. R. CIV. P. 1. Rule 81 excepts bankruptcy actions, copyright actions, and certain admiralty actions from the application of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 81 (comprehensive exceptions to application of procedural rules). Rule 81 does not except civil RICO actions from the applicability of the Federal Rules of Civil Procedure.

In addition to the general applicability of Rule 12(b)(6) to civil RICO actions, several federal appellate courts have affirmed Rule 12(b)(6) dismissals of civil RICO actions. *See, e.g., Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 677 (7th Cir. 2000) (affirming district court's dismissal of civil RICO claims pursuant to Rule 12(b)(6)); *Langford v. Rite-Aid of Alabama, Inc.*, 231 F.3d 1308, 1314-15 (11th Cir. 2000). *See also Chappell v. Robbins*, 73 F.3d 918, 925 (9th Cir. 1996) (affirming district court's 12(b)(6) dismissal of civil RICO cause of action on ground of absolute immunity).

As noted above, the sole allegations against Respondent Betty Davis regarded the issuance or non-issuance of notices and the relaying of simple information about the Beaver Dam Case, all of which activities were patently "judicial" in nature. The allegation against Respondent Malone was that she had no record of a transcript of a hearing or hearings. However, Birnbaum alleged that the acts of Davis and Malone constituted RICO predicate acts of mail and wire fraud.

The RICO statute provides explicitly that there must be a "pattern" of racketeering activity and that "pattern" is defined to "require[ ] at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added); *see also H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237-

38, 109 S. Ct. 2893, 2899-2900, 106 L. Ed. 2d 195 (1989); *McLaughlin v. Anderson*, 962 F.2d 187, 192 (2d Cir. 1992) (noting that the "bare minimum of a RICO charge is that a defendant personally committed or aided and abetted the commission of two predicate acts").

Plaintiff alleged violations of subsections (c) and (d) of section 1962 of the RICO statutes. Those subsections provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) . . . .

18 U.S.C. § 1962(c), (d). A RICO "pattern of racketeering activity requires at least two acts of racketeering activity." § 1961(5). Relevant to Birnbaum's claims, "racketeering activity" means:

> (B) any act which is indictable under . . . title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . .

18 U.S.C. § 1961(1). The elements of mail fraud as a predicate offense for civil RICO purposes are:

> (1) A scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises.
>
> (2) Interstate or intrastate use of the mails for the purpose of furthering or executing the scheme or artifice to defraud.
>
> (3) the use of mails by the defendant connected with the scheme [or] artifice to defraud.
>
> (4) Actual injury to the business or property of the plaintiff.

See 18 U.S.C. § 1341; *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 428 (5th Cir.), *cert. denied*, 498 U.S. 895, 111 S. Ct. 244, 112 L. Ed. 2d 203 (1990). These elements also apply to wire fraud. *Crowe v. Henry*, 115 F.3d 294, 297 (5th Cir. 1997) (Both "RICO mail fraud and wire fraud require, *inter alia*, evidence of intent to defraud . . . .", quoting *Landry*). Fraudulent intent may be found from circumstantial evidence that one party arranged matters with another party in such a way as would facilitate the commission of fraud, especially where the evidence further shows that the first party gained money or advantage at the expense of the second. *Id.*

Finally, Federal Rule of Civil Procedure 9(b) requires specificity in allegations of fraud. To satisfy that rule, it is not enough that the plaintiff simply allege fraudulent intent as a conclusory fact. *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018-1019 (5th Cir. 1996). Furthermore, "rote

conclusory allegations that the defendants 'knowingly did this' or 'recklessly did that' " fail to meet the heightened pleading requirements of Rule 9(b). *Lovelace*, at 1019 (citing *Melder v. Morris*, 27 F.3d 1097 (5th Cir. 1994)).

Birnbaum clearly failed to state a claim under civil RICO. Regarding Malone, Birnbaum did not allege a pattern of racketeering activity. He only complained of one act committed by Malone. Regarding both Davis and Malone, Birnbaum failed to state a claim under civil RICO because he failed to plead allegations that constituted fraud, use of the mails or wire, or a pattern of racketeering. None of the alleged activities of Davis or Malone involved fraud, and Birnbaum failed to adequately allege fraud, which must be specifically pleaded. *See* FED. R. CIV. P. 9(b). Further, Birnbaum failed to adequately plead that Davis or Malone profited from the outcome of the Beaver Dam Case. Birnbaum's Amended Complaint failed in all respects to satisfy his burden.

CONCLUSION

This Court should deny Birnbaum's petition for writ of certiorari. Birnbaum has presented no meritorious grounds for this Court to grant his petition. He has not identified any error in the Fifth Circuit's decision or demonstrated that it conflicts with the decision of another United States Court of Appeals. Further, Birnbaum has not identified an important question of federal law that has not been previously settled or considered by this Court.

Wherefore, Respondents Davis and Malone respectfully request that this Court deny Birnbaum's petition.

Respectfully submitted,

ROBERT S. DAVIS
Counsel of Record
FLOWERS DAVIS, L.L.P.
Attorneys for Respondents
Betty Davis and Becky Malone
815 Rice Road
Tyler, Texas 75703
(903) 534-8063

(3)

No. 00-982

Supreme Court, U.S.
FILED
JAN 22 2001
CLERK

In The

Supreme Court of the United States

UDO BIRNBAUM,

Petitioner,

v.

RICHARD RAY; TOMMY W. WALLACE; JAMES B. ZIMMERMANN; RICHARD DAVIS; PAT MCDOWELL, JUDGE; LESLIE P DIXON; BETTY DAVIS; WILLIAM JONES; BECKY K. MALONE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

Udo Birnbaum, Pro Se
540 VZ 2916
Eustace, TX 75124
(903) 479-3929

10 pp + f/b

TABLE OF CONTENTS

Page

I. THE ISSUES BEFORE THIS COURT ARE ISSUES OF LAW UPON WHAT THE COURTS BELOW DID. RESPONDENTS' DISPUTES UPON DIVERGENT VERSIONS OF THE FACTS BELONG IN DISTRICT COURT. 1

II. THESE RESPONDENTS' VERSION OF THE FACTS DIFFER FROM PETITIONER/PLAINTIFF'S ALLEGATIONS AND SHOULD NOT BE BELIEVED UNDER A FRCP 12(b)(6) DISMISSAL. 2

III. THESE RESPONDENTS' VERSION OF THE STATE-COURT PROCEEDINGS DIFFER FROM PETITIONER/PLAINTIFF'S ALLEGATIONS, AND SHOULD NOT BE BELIEVED UNDER A FRCP 12(b)(6) DISMISSAL. 4

IV. THESE RESPONDENTS FAILED TO ADDRESS THE BRIEFING ISSUE THAT A JURY CAN FIND UPON THE TOTALITY OF THE EVIDENCE, INCLUDING THE FALSEHOODS IN THEIR STATEMENTS..... 5

V. THESE RESPONDENTS' VERSION OF THE EXISTENCE OF A STATE-COURT JUDGMENT CONFLICTS WITH THE EVIDENCE..... 6

CONCLUSION 7

EXHIBIT 1.....App. 1

TABLE OF AUTHORITIES

Page

Reeves v. Sanderson Plumbing, Supreme Court 99-536 (June 12, 2000) 5

ARGUMENT

Note: "Respondents" in this Reply Brief in Opposition means respondents Betty Davis and Becky Malone.

I. THE ISSUES BEFORE THIS COURT ARE ISSUES OF LAW UPON WHAT THE COURTS BELOW DID. RESPONDENTS' DISPUTES UPON DIVERGENT VERSIONS OF THE FACTS BELONG IN DISTRICT COURT.

Of course, the respondents are going to deny that their conduct did in fact violate RICO, and of course their version of the facts is that they did not participate with any of the other defendants in a RICO enterprise either.

This Appeal, however, is upon a FRCP 12(b)(6) dismissal, and these particular respondents' versions of the facts, in so far as they conflict with Plaintiff/Petitioner's version, are of no more importance than the versions of all the rest of the defendants who chose to not respond with their versions of the facts.

The material issues of fact are whether there was a violation of RICO, whether Petitioner/Plaintiff Birnbaum was injured by reason of such violation, and who all participated. Indeed these particular respondents may well have been minor players, but only a determination upon the totality of the evidence can establish such.

The issues of law before this Court is upon the Questions Presented:

1. Whether 18 U.S.C. § 1964(c) ("civil RICO") permits use of the *Rooker/Feldman* claim preclusion doctrine to keep plaintiff from showing his cause when the pleadings and evidence shows the initiation of the state court proceedings was itself an overt act in behalf of the alleged RICO enterprise.

2. Whether 18 U.S.C. § 1964(c) ("civil RICO") permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has pled all the elements of civil RICO and brought evidence of each defendant's conduct.

II. THESE RESPONDENTS' VERSION OF THE FACTS DIFFER FROM PETITIONER/PLAINTIFF'S ALLEGATIONS AND SHOULD NOT BE BELIEVED UNDER A FRCP 12(b)(6) DISMISSAL.

This Appeal and Petition for a Writ of Certiorari is upon a district court's dismissal of a civil RICO cause by the granting of individual FRCP 12(b)(6) motions to dismiss (See Petition for Writ, page 2 and Appendix 12, 13). There was no discovery and never a hearing, and Petitioner's version of the facts is to be believed and all inferences drawn in his favor. Petitioner responds to these respondents' versions of the facts:

1. Respondents' version of the facts: *"The litigation arises from a dispute involving a beaver dam on Birnbaum's property." Respondents page 2.*

On the contrary, the beaver dam litigation scheme arose out of an existing RICO enterprise to bring just such frivolous suits for the purpose of extorting "legal

fees", i.e., the RICO enterprise was well in place before it arose upon Birnbaum. Petioner/Plaintiff's allegation was:

> "This action arises out of a scheme round and about the 294th District Court in Canton, Texas ("Wallace's Court") in which one or more of the Defendants attempted to "enrich" themselves by using their relationships in the Court to extort legal fees, moneys, and other valuable things, by the use of fraudulent documents, arguments, and corrupt Court process as weapons for malicious prosecution. As used in this Complaint, the term "enrich" includes maintaining or securing employment, status, influence, personal power, and/or assurances of each other's present and future support." First Amended Complaint, paragraph 1.

2. ***Respondents' version of the facts:*** *"Birnbaum contended that certain alleged, isolated events on the part of Davis and Malone made them racketeers. The sole allegations against Betty Davis regarded the issuance or non-issuance of notices and the relaying of simple information about the Beaver Dam Case" Respondents page 9. Similar statement Respondents page 3.*

Petitioner Birnbaum alleged that these were not isolated events, but part of a larger pattern of racketeering to defraud him of honest service. Birnbaum alleged that Betty Davis knowingly and willingly participated with the other defendants in a scheme to defraud him of honest judicial service, and that she did so by abuse of the authority entrusted in her by her position. Of course, the respondents' version of the facts will differ from the Plaintiff's, i.e., that they did not violate RICO.

3. ***Respondents' version of the facts:*** *"Birnbaum's entire federal complaint relies on the assertion that the state-court proceeding is void because of the racketeering activities of Respondents Davis, Malone, and others." Respondents page 5, 6.*

Petitioner/Plaintiff Birnbaum does not contest any state-court determinations, for there were none, and was very pleased by the jury's verdict. Birnbaum's complaint relies on the violation of the RICO statute by a scheme to extort and upon defrauding him of honest service.

III. THESE RESPONDENTS' VERSION OF THE STATE-COURT PROCEEDINGS DIFFER FROM PETITIONER/PLAINTIFF'S ALLEGATIONS, AND SHOULD NOT BE BELIEVED UNDER A FRCP 12(b)(6) DISMISSAL.

Dismissal was under FRCP 12(b)(6) and these particular respondents' version of the facts should not be believed:

1. ***Respondents' version of the facts:*** *"The jury awarded no damages to Jones, but awarded him $10,000 in attorney's fees." Respondents page 3.*

The jury determined that there was exactly ZERO damages. There never was a judgment, and no attorney's fees were awarded to either party. See Exhibit 1.

2. ***Respondents' version of the facts:*** *"Birnbaum was unsatisfied with the trial court action, and filed the instant suit in federal district court." Respondents page 3.*

Petitioner/Plaintiff Birnbaum was very satisfied that the jury found ZERO damages, i.e., that the RICO enterprise had not been able to run over him, but was very unsatisfied to have been damaged in time, money, and anguish by the RICO enterprise's attempt to run over him, and the continuing threat of such activity in the community, and decided to pursue this matter as a "private attorney general" by bringing a civil RICO suit. See Petition for Writ.

IV. THESE RESPONDENTS FAILED TO ADDRESS THE BRIEFING ISSUE THAT A JURY CAN FIND UPON THE TOTALITY OF THE EVIDENCE, INCLUDING THE FALSEHOODS IN THEIR STATEMENTS.

These defendants are relying on their individual versions of the facts to counter Petitioner/Plaintiff Birnbaum's civil RICO cause. The issue at bar is whether these defendants participated in a RICO scheme in concert with the other defendants. A jury can find upon the totality of the evidence, including the falsity of the explanations put forward by a defendant:

> "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [employer] was dissembling to cover up a [discriminatory] purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Reeves v. Sanderson Plumbing*, Supreme Court 99-536 (June 12, 2000), quoting *Wright v. West*, 505 U.S. 277, 296 (1992).

V. THESE RESPONDENTS' VERSION OF THE EXISTENCE OF A STATE-COURT JUDGMENT CONFLICTS WITH THE EVIDENCE.

Petitioner/Plaintiff Birnbaum makes the following replies to these respondents' arguments at law upon a supposed state-court judgment:

1. Respondents' version of the facts: *"Birnbaum particularly relies upon this Court's statement that '[t]he object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, "private attorneys general", dedicated to eliminating racketeering activity.' However he cites no authority for his conclusion that this object allows a private RICO plaintiff to challenge a state-court decision in federal district court." Respondents page 7, 8.*

Birnbaum is not challenging a state-court decision, for the RICO scheme did not succeed. No judgment against him was obtained as indicated by the Clerk's certification, which states:

> TO WHOM IT MAY CONCERN:
>
> I, Nancy Young, District Clerk, Van Zandt County, Texas, certify that on this day, searched the records in the 294th Judicial District Court and have found in cause number 95-63, styled William B. Jones Vs. Udo Birnbaum, there exists no final judgment, and no judge is currently assigned to this cause. The last entry on the docket sheet is September 28, 1998. Attached hereto and made a part hereof is a certified copy of four pages of the Civil Docket regarding this case.
>
> Signed this 22nd day of August, 2000.

Nancy Young, District Clerk
Van Zandt County, Texas

All parties to this cause, as part of the proceedings in the Fifth Circuit, had been provided with this document (Exhibit 1), and it is noteworthy that these, the only respondents in opposition to Birnbaum's Petition for writ, never come right out and state that there was a state-court judgment, but nevertheless keep arguing points of law about state court "decisions" and "judgments" in support of the Fifth Circuit's finding under the *Rooker/Feldman* Doctrine upon state-court proceedings.

CONCLUSION

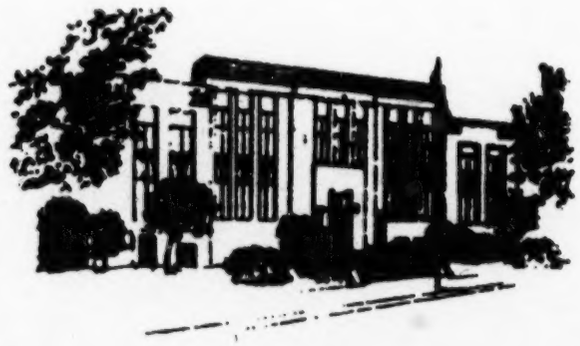
Respondents' doctrinal argument cannot overcome the statutory language and legislative intent of civil RICO, and especially so where the very doctrines argued are at issue by the Questions Presented. Respondents' arguments at law are also flawed by erroneous versions of the facts.

Birnbaum respectfully requests that this Court grant his Petition for writ or certiorari for the reasons stated in his Petition.

Respectfully submitted,

Udo Birnbaum
540 VZ 2916
Eustace, TX 75124
(903) 479-3929

NANCY YOUNG
DISTRICT CLERK
121 E. Dallas St.
Courthouse - Room 302
Canton, Texas 75103



County of Van Zandt

294th Judicial District
Phone 903-567-6576

August 22, 2000

App. 1

TO WHOM IT MAY CONCERN:

I, Nancy Young, District Clerk, Van Zandt County, Texas, certify that on this day, searched the records in the 294th. Judicial District Court and have found in cause number 95-63, styled William B. Jones Vs. Udo Birnbaum, there exists no final judgment, and no judge is currently assigned to this cause. The last entry on the docket sheet is September 28, 1998. Attached hereto and made a part hereof is a certified copy of four pages of the Civil Docket regarding this case.

Signed this 22nd. day of Agust, 2000.

Nancy Young

Nancy Young, District Clerk
Van Zandt County, Texas